Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-302

FRANK L. RIZZO, *et al.*, Petitioners

v.

HAROLD ROSENTHAL, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioners, Frank L. Rizzo, Phillip Carroll, Augustine Salvitti and the Redevelopment Authority of Philadelphia respectfully pray that a writ of certiorari issue to review an order of the United States Circuit Court of Appeals for the Third Circuit entered in this proceeding on May 25, 1977.

OPINION BELOW

The opinions of the Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania appear in the Appendix hereto.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. §1245(1).

QUESTIONS PRESENTED

I. Can an indisputably "confidential" employee, *i.e.* an intradepartmental spy, of a municipal authority be discharged without a due process hearing in accordance with *Elrod v. Burns*, 427 U.S. 347 (1976)?

II. Was not summary judgment the proper disposition in the court below, since no dispute existed among the parties as to the facts of this case?

CONSTITUTIONAL PROVISION INVOLVED

FIRST AMENDMENT to the UNITED STATES CONSTITUTION.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. §§1331, 1343(3), (4), 2201, 2202 and the pendant jurisdiction of the Court, alleging violation of 42 U.S.C. §1983. Specifically, Respondent, Harold Rosenthal alleged that he was discharged from his position of employment with the Redevelopment Authority of Philadelphia (the Authority) in violation of his Fourteenth Amendment right to a procedural Due Process hearing and his First Amendment right to free political association in January of 1974.

Respondent, Harold Rosenthal was hired by his stepsister, Lynn Abraham, the Executive Director of the Authority as a confidential employee; one whom she "could trust implicitly." (Respondent's witness Lynn Abraham's deposition at 8.) Although hired to fill a standard job classification, his actual job was created by Ms. Abraham —that is, as all parties agreed, a personal investigator.

When Ms. Abraham assumed the position of Executive Director, the Authority was under investigation. In her opinion, corruption and graft ran rampant throughout the Commercial and Industrial Relocation Division. Respondent Rosenthal's primary purpose was to investigate and report directly to her, advising her of the state of affairs in that division so that she would then know "how best to correct a very sticky and nasty situation." (Abraham's deposition at 15.)

On December 5, 1973, Augustine A. Salvitti replaced Lynn Abraham as Executive Director of the Authority. One of the first actions Mr. Salvitti took was to review the top level personnel in the Authority to weed out incompetents. Respondent, being a member of that top level, was included in the review and found wanting.

Mr. Salvitti, a defendant in the district court, discharged Rosenthal. In Mr. Salvitti's estimation, respondent was incompetent to perform the regular duties of his job

classification and he had no use for Rosenthal in the capacity he served under Ms. Abraham—an intra-departmental spy.

The suit was brought against the Authority, Augustine A. Salvitti, Executive Director of the Authority, Frank L. Rizzo, Mayor of Philadelphia, and Phillip Carrol, Deputy Mayor of Philadelphia. After depositions and the filing of an amended complaint in April of 1976, which added the First Amendment claim, all defendants filed motions for summary judgment. The motions were granted in an order dated April 30, 1976, and filed on May 4, 1976.

The District Court rejected respondent's arguments that he had a property interest in his employment and rights under the Fourteenth Amendment to notice or to a pretermination hearing, holding that the sufficiency of such a claim must be decided by reference to state law; *Bishop v. Wood*, 426 U.S. 341, 344 (1976), and that under Pennsylvania law, public employees have no entitlement to dismissals only for cause unless the legislature has expressly provided tenure for a given class of employees. *Mahoney et al. v. Philadelphia Housing Authority*, 13 Pa. Comm. Ct. 243, 320 A.2d 459, *cert. denied*, 417 U.S. 1122 (1974); *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A.2d 278 (1960); *American Federation of State County and Municipal Employees v. Shapp*, 443 Pa. 527, 280 A.2d 385 (1971). The Third Circuit Court of Appeals affirmed holding that "[S]ince the legislature had not provided for tenure in Rosenthal's job classification, he had no right to a 'cause' hearing before discharge." (*Rosenthal* at A3.)

The Disrict Court rejected respondent's First Amendment claim on the grounds that the undisputed facts established as a matter of law that his position of employment was a policy-making position, and that First Amendment protections were not available. Citing *Nunnery v. Barker*, 503 F.2d 1344 (4th Cir., 1974), *cert. denied*. 420 U.S. 1005 (1975); *Illinois State Employees' Union Council*

34 v. Lewis, 473 F.2d 561 (7th Cir. 1972); *Gould v. Walker*, 356 F. Supp. 421 (N.D. Ill. 1973). The District Court's opinion of the nature of respondent's position was based on undisputed facts as to what functions respondent actually performed. Those facts being undisputed, there remained nothing for the District Court to do but apply the law and draw a conclusion. This it did in petitioner's favor.

The District Court did not reach the claims made pursuant to its pendent jurisdiction.

On May 25, 1977, respondent filed a notice of appeal to the United States Court of Appeals for the Third Circuit under Rule 12(6).

In an order filed on May 25, 1977, the Third Circuit reversed the judgment of the District Court (one judge dissenting) except as to the Fourteenth Amendment claim and remanded the cause to the District Court for further proceedings.

The majority in the Third Circuit based their reversal on an overly restrictive, reading of the recent Supreme Court case of *Elrod v. Burns*, 427 U.S. 347, 49 L.Ed. 547 (1976), which sets out an exception to the general rule that a state may not condition the hiring or discharge of an employee in a way which infringes on his right of political association. The Court of Appeals for the Third Circuit read *Elrod* to limit the exception "in the case of state employees who *formulate* policy." (*Rosenthal* at A3) (emphasis supplied); thus limiting the thrust of *Elrod*, which included "confidential" employees within the exception. The *Rosenthal* majority, though agreeing that respondent was a "confidential" employee, *i.e.* an intra-departmental spy, decided that Justice Stewart used the word "nonconfidential" as a mere additional adjective.

Moreover, the majority felt that the District Court had improperly weighed conflicting evidence and resolved an issue of fact on the motion for summary judgment, improperly depriving respondent of a full trial on the issue

of whether or not he was a policy-maker. Again, there was no question but that respondent was a "confidential" employee.

The dissent was based on two grounds. "First, summary judgment was the proper disposition since no dispute existed among the parties as to the actual historical or narrative facts of this case." (*Rosenthal*, dissent at A8.) The dissent found that all parties agreed "on what Rosenthal actually did—the 'basic' facts. . . ." The only question that faced the District Court was how these "basic facts" were to be interpreted according to the law—that is, how to characterize respondent's job.

"Second, assuming *arguendo* that Harold Rosenthal was fired for political reasons, the proscriptions of *Elrod v. Burns*, 427 U.S. 347 (1976), cannot operate in cases such as this, where appellant is clearly a 'confidential' policy making employee." (*Rosenthal*, dissent at A8) (footnote omitted). The dissent saw this as an alternative ground for affirming the District Court's judgment, pointing out Justice Stewart's concurrence in *Elrod* which stated that confidentiality and policy-making were each criteria on which to judge a dismissal. In other words, "nonconfidential" was not used by Justice Stewart as a mere "additional adjective" as the *Rosenthal* majority stated.

Although both the majority and dissent in *Rosenthal* agreed that respondent was a confidential employee, that he was hired as an intra-departmental spy and fired for the same reason, they disagreed as to the significance of this undisputed fact. Their divergence of opinion concerns the meaning of the word "nonconfidential" as used by Justice Stewart in his concurrence to the *Elrod* plurality. *Elrod v. Burns*, supra at 375. Does the confidential employee respresent another category of employees who may be discharged without a due process hearing?

The dissent stated that there were sufficient undisputed facts upon which to base a conclusion of law that respondent was a "confidential employee", *i.e.*, an intra-

departmental spy, of the former Executive Director of the Authority and his presence in the Authority under a new Executive Director could only obstruct the implementation of new policy. The dismissal of respondent would not undermine the purpose of *Elrod*—that is, to insure that our system of government would "not be undercut by tactics obstructing the implementation of policies of a new administration." *Elrod*, supra at 367.

In *Rosenthal*, the dissenting interpretation in *Elrod* is correct. It is clear that there was no factual issue before the District Court, and that Court was correct in its judgment. Consequently, the opinion of the Court of Appeals for the Third Circuit should be reversed.

REASONS FOR GRANTING THE WRIT

I. The Divergence of Opinion Between the Majority and Dissent in the Court of Appeals in Rosenthal Concerns the Interpretation of Justice Stewart's Concurrence in Elrod v. Burns, Which Can Only Be Clarified by this Court.

Respondent, Rosenthal was, according to the testimony of all witnesses, a "confidential" employee. Justice Stewart, in articulating the rule of *Elrod* in his concurrence stated that the protections outlined by that case applied only to "nonpolicy-making *nonconfidential* government employees. . . ." 427 U.S. at 375 (emphasis supplied). As such, respondent's dismissal clearly falls within the *Elrod* plurality's exception.

The determining divergence of opinion between the majority and the dissent in the Third Circuit in the instant matter, concerned the significance of Justice Stewart's use of the word "nonconfidential" in his concurrence in *Elrod*. The dissent stated that the distinction between policy-making and nonpolicy-making was only one criteria for the application of the *Elrod* protections and assigned equal importance to the confidential-nonconfidential distinction. On the other hand, the majority stated that Justice Stewart's use of the word "nonconfidential" was only as an "additional adjective" which "does not change the basic thrust of the *Elrod* plurality opinion which is directed at policy *formulation* and representative government." (*Rosenthal* at A6, n.5) (emphasis in original),

As the *Rosenthal* dissent described him, "Rosenthal was, at the very least, a 'confidential" employee." He was hired by his step-sister because she had to find someone whom she 'could trust implicitly,' (*Rosenthal* dissent at A14),' "to tell [her] what [was] going on so [she could] know best how to correct it." (Plaintiff's witness, Lynn Abraham's deposition at 15). "[*A*]*ll parties* agreed that Rosenthal

was hired as Lynn Abraham's personal investigator." (*Rosenthal* dissent at A9) (emphasis supplied). "His mission was to investigate a certain department and report directly back to Abraham on its activities." In light of this consensus on the nature of respondent's position, it is clear that the disagreement as to the meaning of Justice Stewart's concurrence in *Elrod* was alone determinative of the *Rosenthal's* majority's judgment. Only this Court can definitively explain whether the protections afforded government employees by the *Elrod* opinion extend to intra-departmental spys.

That the *Elrod* exceptions should not be restricted to policy "formulators" is evident in the Court's articulation of the interest which they sought to protect—that is, "that representative government not be undercut by tactics obstructing the implementation of policies of [a] new administration, policies presumably sanctioned by the electorate." 427 U.S. at 367. Upon review of respondent's functions, it becomes clear that the implementation of the policies of a new administration can be obstructed by carrying employees such as respondent.

> "Rosenthal was not an integral part of the Commercial Industrial Relocation Division; rather, he was a personal extension into that department of its administrator, Lynn Abraham. As such, he was privy to the 'discussions and information involved in the policy-making process.' When Abraham left the Authority, Rosenthal no longer had a role to play. His original, confidential function now defunct, he could not implement the policies of the new administration. His presence could only obstruct new policy implementation, the very danger sought to be avoided by the *Elrod* exception." (Rosenthal, dissent at A15).

Justice Stewart's concurrence in *Elrod* focused the plurality's rationale on the realities of government. If the majority's narrow and unrealistic interpretation is allowed

to stand, the dangers sought to be avoided by *Elrod* will be realized.

II. In Granting Summary Judgment, the District Court Properly Treated the Issue of Whether Respondent Was a "Policy-Making" Employee as a Matter of Law.

Under Federal Rules of Civil Procedure 56(c), a district court can grant summary judgment only when "there is no genuine issue as to any material fact. . . ." The district court opinion in the instant matter indicated that there was an agreement among the parties as to the facts —that is, respondent's actual daily functions. The only question remaining was how to *characterize* respondent's position, a question which the district court properly decided as one of law. Within the bounds of these undisputed facts, the court found the basis for granting summary judgment.

The Court of Appeals for the Third Circuit found that "[e]vidence as to the *nature* of Rosenthal's duties, in the form of depositions, was imprecise and cut both ways." (*Rosenthal*, at A4) (emphasis supplied). However, the evidence presented concerned not the nature of respondent's position but the primary facts from which a court might determine the nature of respondent's position, which is a question of law and not of fact.

The dissent in the Third Circuit recognized the propriety of the district court's action. "Whether it (Rosenthal's position) should be characterized as a policy-making position was not a remaining issue of basic fact, but an issue of *ultimate* fact, and therefore a matter of law for the court and not the jury." *Rosenthal*, dissent at A10 (emphasis in original), citing *Helvering v. Tex-Perm Oil Co.*, 300 U.S. 481, 491 (1937); *Watts v. Indiana*, 338 U.S. 49, 51 (1949); and *United States v. Delerine*, 457 F.2d 156 (3d Cir. 1972).

Although the evidence was presented in a manner which allowed the witnesses to characterize the facts presented as to the nature of respondent's position, there was, as the District Court and the dissent in the Third Circuit pointed out, agreement as to the actual functions performed by Rosenthal.

Respondent Rosenthal was hired by his step-sister, Lynn Abraham, the Executive Director of the Authority, to work for her, in her words, "as an overseer of the Commercial, Industrial Division" (plaintiff's witness, Lynn Abraham's deposition at 8). He was her "liaison" (Abraham deposition at 11). He was someone she could trust, "to tell me what is going on so I can know best how to correct it." (Abraham deposition at 15). When offering respondent the position she asked him, "Are you interested in going over there (the Commercial and Industrial Relocation Division) and appraising this situation and apprising me of what goes on so I know . . . how best to correct a very sticky and nasty situation?" (Abraham deposition at 15). He was to report directly to Ms. Abraham. (Abraham deposition at 16). One of his assignments was to work "in tandem" with his immediate superior to "write the entire moving and relocation code," and to "tighten up procedures." (Abraham deposition at 12). As stated earlier this testimony came from Lynn Abraham, the Executive Director, throughout respondent's employment at the Authority. This testimony was not conclusory. It did not describe the nature of respondent's work but what he was asked to do and what he did. This testimony was not contradicted.

Regardless of other testimony as to what respondent did or the characterization of his functions, the foregoing testimony supplied the District Court with enough undisputed facts on which to base a conclusion of law that respondent's position was of a policy-making nature.

To characterize these undisputed facts in accordance with the law was the proper function of the District Court on a motion for summary judgment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 1977, three copies of the Petition for Writ of Certiorari were hand delivered to Michael Cox, Esquire, 37 South 13th Street, Philadelphia, Pennsylvania 19107, Counsel for Respondent. I further certify that all parties required to be served have been served.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2082

HAROLD ROSENTHAL,
Appellant,

v.

FRANK L. RIZZO, individually, and in his official capacity, PHILLIP CARROLL, individually, and in his official capacity, AUGUSTINE SALVITTI, individually, and in his official capacity, and THE REDEVELOPMENT AUTHORITY OF PHILADELPHIA.
Appellees.

Appeal From the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil No. 75-240

Submitted Under Third Circuit Rule 12(6) on March 29, 1977

Before SEITZ, *Chief Judge,* ALDISERT and HUNTER, *Circuit Judges*

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(Filed May 25, 1977)

HUNTER, *Circuit Judge:*

This appeal presents claims of employee discharge in violation of the First and Fourteenth Amendments. The District Court for the Eastern District of Pennsylvania entered summary judgment against the employee, Harold Rosenthal. We find no error in the disposition of the Fourteenth Amendment claim.[1] We reverse and remand, however, as to the First Amendment claim for the following reasons.

Harold Rosenthal was appointed to a $14,257-a-year position as an Administrative Assistant II in the Commercial and Industrial Relocation Department of the Redevelopment Authority of Philadelphia on October 24, 1972. When Augustine Salvitti took over as the Authority's Executive Director in January, 1974, he fired Rosenthal without a prior hearing. On January 29, 1975, Rosenthal filed an action in the Eastern District of Pennsylvania against the Authority, Salvitti, Frank Rizzo (the Mayor of Philadelphia), and Phillip Carroll (the Deputy Director of Philadelphia). Rosenthal based his action on 42 U.S.C. §1983 and pendent state claims. His primary allegations were (1) that his discharge without a hearing violated his right to due process under the Fourteenth Amendment, and (2) that he had been discharged because of his political affiliation, in violation of his First Amendment rights of political association. He set forth factual allegations in support of both claims. On April 30, 1976, the district court granted summary judgment against Rosenthal as to all defendants, and he appealed.

Rosenthal's Fourteenth Amendment claim was that he had an "objective expectancy of continued employment" and could be dismissed only for "cause." Under

[1] We express no opinion as to Rosenthal's pendent state claims, since the district court apparently felt it unnecessary to pass upon them after the grant of summary judgment as to all federal claims.

Bishop v. Wood, 426 U.S. 341, 344 (1976), "the sufficiency of the claim of entitlement must be decided by reference to state law." The court below properly ruled against Rosenthal, because under Pennsylvania law, public employees have no contractual entitlement to dismissals only for cause unless the legislature has expressly provided tenure for a given class of employees. *Mahoney v. Philadelphia Housing Authority*, 13 Pa. Cmwlth. 243, 320 A.2d 459 (1974), *cert. denied*, 419 U.S. 1122 (1975). Since the legislature had not provided for tenure in Rosenthal's job classification, he had no right to a "cause" hearing before discharge.

Rosenthal's First Amendment claim, however, was more substantial. In general, a state may not condition hiring or discharge of an employee in a way which infringes his right of political association. *E.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elrod v. Burns*, 44 U.S.L.W. 5091 (U.S., June 28, 1976). An exception to this First Amendment protection exists in the case of state employees who formulate policy. This exception is designed to insure "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod, supra*, at 5097.

For Rosenthal to obtain relief on his First Amendment claim, then, he had to show that he was a non-policy-making employee. Paragraph 10 of his complaint, Appendix at 6a, alleged that his "was a 'non-policy-making' position." In their answer, Appendix at 13a, defendants Salvitti and the Redevelopment Authority admitted the truth of that allegation.[2]

[2] Rosenthal subsequently amended his complaint with respect to the First Amendment claim, but the amended complaint expressly declared that "Plaintiff realleges and incorporates by reference herein paragraphs 1-27, and 29-36 of plaintiff's original complaint." Appendix at 136a. Thus, the crucial paragraph 10 was realleged, and defendants made no attempt to withdraw the admission in their answer.

Defendants Rizzo and Carroll never filed an answer; however, in their motion for summary judgment, they did contest Rosenthal's allegation that he did not formulate policy. Evidence as to the nature of Rosenthal's duties, in the form of deposition, was imprecise and cut both ways. On the one hand, there was testimony that Rosenthal was merely a "soldier," Appendix at 72a; that he merely oversaw bidding practices to uncover corruption and to make sure policies implemented by others were carried out, Appendix at 113a; indeed, defendant Salvitti himself declared that Rosenthal's primary duty was to act as a spy for the former Director of the Authority, Appendix at 94a; that he had no power to decide which bids for relocation work would be accepted, Appendix at 115a; that he merely worked for the actual policymaker in his department, Appendix at 117a. On the other hand, there was testimony to the effect that he helped rewrite the relocation code, Appendix at 51a; that Rosenthal was a "top line" employee, Appendix at 7a; that he oversaw work and reviewed bids, 99a.

Thus, two of the defendants admitted Rosenthal's status as a non-policymaker, while as to the other two defendants, Rosenthal's status represented a genuine issue of material fact. Nevertheless, the district court took it upon itself to weigh the conflicting evidence and resolve the issue against Rosenthal on a motion for summary judgment.[3] This was error. Under Fed. R. Civ. P. 56(c), a district court can grant summary judgment only when "there is no genuine issue as to any material fact. . . ." Pro-

[3] The district court may have believed that Rosenthal's status as a policymaker *vel non* was a question of law, for in addressing the First Amendment claim, the court indicated that there were no facts in dispute: "Since there is no substantial dispute as to the facts there remains solely the question of whether plaintiff's employment was a 'policy-making' position." Appendix at 139a-140a. The court's approach to the issues, however, belies such an interpretation:

fessors Wright and Miller have explained that requirement:[4]

> A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. Given this function, the district court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to exposing sham claims and false defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Accord, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).[5] While the court below might have been

> *Based upon our review of the affidavits and deposition transcripts we find* that plaintiff was employed in a policy-making position by the R.D.A. His duties included the investigation and supervision of the bidding procedures for moving contracts and thereby he made, at the minimum, an indirect contribution to the formulation of R.D.A. policy. *As a result of this finding*, we have concluded that as a matter of law plaintiff cannot successfully challenge the termination of his employment on the basis of infringement of his First Amendment rights.

Appendix at 140a (emphasis added). Thus, the district court apparently was aware that it was making a *finding of fact* based upon its weighing of the evidence.

[4] 10 C. Wright & A. Miller, Federal Practice & Procedure §2712, at 378-82 (1973) (footnotes omitted).

[5] Examination of the *Elrod* plurality's criteria for determinations of policy-making status reveals how difficult the job of weighing evidence on that issue can be and, consequently, how inappropriate it is on a Rule 56 motion:

Note 5—*Continued*

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. Thus the political loyalty "justification is a matter of proof, or at least argument, directed at particular kinds of jobs." *Illinois State Employees Union v. Lewis, supra,* at 574. Since, as we have noted, it is the Government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the [state] on remand, cases of doubt being resolved in favor of the particular [employee].

44 U.S.L.W. at 5097. Thus, the determination of status as a policymaker *vel non* presents a difficult factual question. Where there is evidence to support the employee's claim that he does not make policy, as there is here, he is entitled to a full trial on the issue. Indeed, the state bears the burden of persuasion on that question at trial. Certainly, then, it was improper for the district court to weigh the evidence and rule against Rosenthal on this issue on a Rule 56 motion.

It is true that Mr. Justice Stewart's concurrence in *Elrod* refers to a "nonpolicy making, nonconfidential government employee." 44 U.S.L.W. at 5099. In our view the additional adjective —nonconfidential—does not change the basic thrust of the plurality opinion, which is directed at policy *formulation* and representative government. A "confidential government employee" in this sense would not necessarily be one—as Rosenthal may have been—who has covert activities as part of his duties, but instead one who is privy to the discussions and information involved in the policymaking process. Rosenthal held a job with a specific title and certain responsibilities. The fact that he may have engaged in covert activities in addition to discharging other, everyday duties, to be dispositive of his claim to retain the basic job.

inclined, as is the dissent, to resolve the evidentiary conflict in defendants' favor and conclude that Rosenthal had no duties apart from ones involving policy formulation, "a motion for summary judgment should not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside as against the weight of the evidence." 6 J. Moore, Federal Practice ¶56.04[2], at 2067 (2d ed. 1976).

In the case *sub judice,* Rosenthal was improperly deprived of a full trial on the issue of his status as a policymaker;[6] consequently, his claim that he was fired because of his political affiliations, in violation of the First Amendment, was not considered. Therefore, the judgment of the district court will be reversed as to all defendants and remanded for proceedings consistent with this opinion.

---

[6] We need not, and do not, address the district court's power to permit amendment of the pleadings—i.e., the admission of Rosenthal's non-policymaking status by Salvitti and the Authority —on remand.

TO THE CLERK:

Please file the foregoing opinion.

/s/

James Hunter, III, *Circuit Judge*

ROSENTHAL, *Appellant* v. RIZZO, No. 76-2082

Aldisert, Circuit Judge, Dissenting.

I would affirm the judgment of the district court for two discrete reasons. First, summary judgment was the proper disposition since no dispute existed among the parties as to the actual, historical or narrative facts of this case. Second, assuming *arguendo* that Harold Rosenthal was fired for political reasons, the proscriptions of *Elrod v. Burns*, 427 U.S. 347 (1976), cannot operate in cases such as this, where appellant is clearly a "confidential", policymaking employee.[1]

1. I am troubled by the lack of support in the discovery materials and affidavits for the allegation that Rosenthal was fired for his political associations, a necessary starting point for the majority's analysis. Plaintiff's initial complaint did not allege that he lost his job for political reasons. There is no indication in the record that Rosenthal was ever asked to change his party registration or that he was pressured to support a particular political party in order to retain his job. On the other hand, there *is* evidence that appellee Salvitti fired Rosenthal because Rosenthal was "unqualified" for the job. Appendix at 94a-95a. This situation is factually distinct from *Elrod*, *supra*, in which the appellants were fired because of their lack of affiliation with the Democratic party.

The district court, however, granted leave for Rosenthal to file an amended complaint substantiating his claim of abridgement of First Amendment rights of freedom of speech and association. The amended complaint, on its face, elevated this case to a level far exceeding the quality of the proofs offered. Nevertheless, even assuming *arguendo* that politics played a part in Rosenthal's dismissal, for reasons discussed hereinafter he cannot prevail.

Nor do I attach critical importance to defense counsel's failure to contest the allegation in the tenth paragraph of the original complaint that plaintiff was in a non-policymaking position. First, as heretofore observed, plaintiff's initial complaint did not allege that he lost his job for political reasons. Second, what was ultimately before the district court, and what is presently before this court for adjudication, is not the original complaint, but an amended complaint. At the time the amended complaint was filed, the legal issue had been joined, and the parties, both sides, met it

I.

In granting summary judgment, the district court properly treated the issue of whether Rosenthal was a "policymaking" employee as a matter of law. There existed no real dispute as to the historical or narrative facts. Rosenthal held the position of Administrative Assistant to the Director of Commercial and Industrial Relocation for the Redevelopment Authority of Philadelphia. He was hired by his stepsister Lynn Abraham, then Executive Director of the Authority, to report to her on the activities of the Commercial and Industrial Relocation Department of the Authority. Appendix at 58a, 112a. Abraham explained that she wanted somebody whom she could "trust" to tell her what was happening in that department, which, according to Abraham, was operating in an allegedly questionable fashion. *Id.* at 58a. Appellee Salvitti described Rosenthal's hiring as being "for one specific reason, that was to spy on the department for Lynn Abraham." *Id.* at 94a.

A.

Behind such emotive linguistic tags as "someone to trust", or "a spy", there lies a consensus which belies the majority's concern that the "conflicting evidence" should have precluded summary judgment: namely, all parties agreed that Rosenthal was hired as Lynn Abraham's per-

on the strength of the depositions, not pleadings. Although I am reluctant to resort to Mechanical Jurisprudence, for it is established that the purpose of Federal Rules of Civil Procedure was to avoid fact pleading formularies, If I did I would conclude (a) the original answer to the original complaint has minimal jurisprudential significance, because the original complaint was superseded by an amended one, (b) no answer was filed to the amended complaint and therefore no admissions can be drawn from our answer, and (c) as hereinafter developed, I perceive the question of "policy maker" to be one of law, and not of fact, and therefore not subject to any rules relating to admitting facts in pleadings.

sonal investigator. Since there was agreement on what Rosenthal actually did — the "basic" facts — the only remaining question was how to characterize his job. Whether it should be characterized as a policymaking position was not a remaining issue of basic fact, but an issue of *ultimate* fact, and therefore, a matter of law for the court, and not the jury. "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or constitutional facts." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491(1937). Justice Frankfurter's explanation in *Watts v. Indiana*, 338 U.S. 49, 51 (1949), has particular significance here:

> But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for the Court's adjudication . . . [It is] important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determination of fact, are the very issues to review which this Court sits.

See also United States v. Delerme 457 F.2d 156 (3d Cir. 1972).

The district court here did not shirk its responsibility in meeting the question of law. Nor should this court.

B.

The *Elrod* plurality itself provided guidance for discerning the essential character of a job:

> No clear line can be drawn between policymaking and nonpolicymaking decisions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. . . . An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals.

427 U.S. at 367-68. In the present case, ample information in the record supports the district court's characterization of Rosenthal's job as a policymaking one. Along with the undisputed fact that Rosenthal "act(ed) as an advisor" to Abraham, considerations supporting the district court's ultimate finding include Rosenthal's exercise of supervisory responsibilities, Appendix at 107a-08a, 119a-21a, 125a; his actions as liaison between two Authority departments, *id.* at 118a-19a; his recommendations regarding bid acceptances, *id.* at 118a; and his participation in the revision of the moving and relocation code. *Id.* at 55a.

II.

An alternate ground for affirming the district court's judgment lies in the necessary conclusion that even if Rosenthal is not viewed as a "policymaker" within a particular judge's conception of that term, he was clearly at least a "confidential" employee. As such, his dismissal still falls within the *Elrod* plurality's exception, fashioned to insure "that representative government not be undercut by tactics obstructing the implementation of policies of [a] new administration, policies presumably sanctioned by the electorate." *Elrod, supra,* 427 U.S. at 367.

A.

In *Elrod*, the Supreme Court addressed a claim that patronage dismissals of non-civil-service employees of the Cook County, Illinois, Sheriff's Office, were violative of the First Amendment freedoms of political belief and association. Justice Brennan, in a plurality opinion joined by Justices White and Marshall, concluded that any contribution which political patronage might make to the democratic process was not sufficient to override its encroachment on First Amendment freedoms. As support for this view of patronage, the plurality quoted from *CSC v. Letter Carriers*, 413 U.S. 548 (1973): "[T]he judgment of Congress, the Executive, and the country appears to have been that partisan/political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences." 427 U.S. at 354, *quoting Letter Carriers*, *supra*, 413 U.S. at 564. This statement, however, was used by the *Letter Carriers* Court for a far different reason—to support the constitutionality of the Hatch Act's prohibition against federal employees' taking an active part in political management or political campaigns. It is well to note a passage from *Letter Carriers* which appears shortly after the plurality's truncated quotation: "Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act." 413 U.S. at 564. In effect, then, the *Elrod* plurality attempted to extend by case law the application and scope of a statute, the Hatch Act, regulating certain federal employees, to state or county employees not covered by the federal statute. Thus, the *ratio decidendi* of the *Elrod* plurality is somewhat tenuous.

Fortunately, five Supreme Court justices (Justices Stewart and Blackmun, concurring; Chief Justice Burger, and Justices Powell and Rehnquist, dissenting) could not ascribe to the *Elrod* plurality's broad renunciation of the patronage system, in Justice Stewart's formulation, a "wide-ranging opinion." 427 U.S. at 374. Thus, in concurrence, Justice Stewart articulated the rule of the case: "[*A*] *nonpolicymaking, nonconfidential government employee* [cannot] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." 427 U.S. at 375 [emphasis added].[2]

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2. Were I writing on a cleaner slate, I would not even embrace the limitations imposed by the concurrence. Neither the plurality nor the concurrence supplied sufficient rebuttal to Justice Powell's claim, in dissent, that patronage and the material incentives it provides stimulate "political activity and by strengthening parties, thereby [help] to make government accountable." 427 U.S. at 382. The plurality's assertion that the abolition of patronage dismissals will not "bring about the *demise* of party politics" is simply not responsive to the question of accountability in government.

Acknowledging that abuses may inhere in the patronage system, I nevertheless am not prepared to conclude that there has been a corresponding increase in the quality of city, county, state and federal services since the wholesale granting of permanent tenure to government employees, by civil service legislation, and now by judicial fiat, began. My own experience is that municipal streets seem dirtier; police protection less efficient; highway maintenance virtually non-existent (in my own state of Pennsylvania); postage service a national disgrace; metropolitan garbage collection a matter of grace, not right; refuse collection a matter of private contract; and a constantly increasing headless federal civil service bureaucracy approaching the cruel, impersonal inefficiency of that of the French. Accountability to elected officials, and thus to the public, seems to be an historical concept only.

Edward N. Costikyan suggests:

> [A]ll the histories of the political machines and their workings have been written from a reform orientation. It should be observed, however, in the absence of fairer con-

B.

Harold Rosenthal was, at the very least, a "confidential" employee. He was hired by his step-sister because she had to find someone whom she "could trust implicitly." Appendix at 51a. His mission was to investigate a certain

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Note 2—*Continued*

> temporaneous data, that the political machines built the cities, paved their streets, dug their sewers, and piped their water supply systems. Furthermore, under the administration of the machines, mass transit systems, school systems, and massive developments of new housing were constructed.
>
> It would be laughable to suggest that any of our present city administrations could acomplish one-tenth of what the political machines accomplished during the period from the Civil War to World War I.
>
> The reform answer to the machine as the personnel pool for government was the creation of a competing source of manpower: civil service. As long as civil service and the machine remained in competition for the staffing of the government, the administrative result was good. But with the collapse of the machine, civil service has monopolized the field, and the administrative results have been disastrous, for the bureaucracies have a double layer of protection that deprives any elected official of the power to get the bureaucrats to do their jobs. One layer is the impossibility of firing a civil servant. The other is the civil service unions, which have such power over the city—in the absence of alternative sources of manpower—that in the final analysis the bureaucracies are in a position to dictate to elected officials and their appointees. The bureaucrats can specify what they will and will not do (such as inspect boilers during a cold wave), what they will wear, and where they will work. The elected official (or his appointee) is at their mercy.
>
> . . .
>
> Our cities will survive and be governable only if those we elect have effective power over those who are supposed to do the work, [and] only if those we elect are responsible and accountable to the people who elect them. . . .

Costikyan, "Cities Can Work", SATURDAY REVIEW, April 4, 1970, 19, 20, 39.

department and report directly back to Abraham on its activities. Once Abraham left the Authority, her successor understandably determined that he could not utilize appellant in the same manner.

The majority attempts to limit the thrust of the confidential employee exception by suggesting, in footnote 5, that a confidential employee would not be one "who has covert activities as part of his duties, but instead one who is privy to the discussions and information involved in the policymaking process." Yet the majority admits that the purpose of the *Elrod* exception is to insure that our system of government "not be undercut by tactics obstructing the implementation of policies of the new administration." Majority Opinion at 2, *quoting Elrod, supra,* 427 U.S. at 367. Rosenthal was not an integral part of the Commercial and Industrial Relocation Department; rather, he was a personal extension into that department of its administrator, Lynn Abraham. As such, he was privy to the "discussions and information involved in the policy-making process." When Abraham left the Authority, Rosenthal no longer had a role to play. His original, confidential function now defunct, he could not implement the policies of the new administration. His presence could only obstruct new policy implementation, the very danger sought to be avoided by the *Elrod* exception.

Accordingly, there being no role to be played by a fact-finder in these proceedings, the basic facts not being disputed, it remained for the court to draw a legal conclusion from those facts. The district court did just that. It faced up to an obligation to decide a question of law. And I would affirm what it did.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2082

HAROLD ROSENTHAL, *Appellant*

vs.

FRANK L. RIZZO, individually, and in his official capacity, PHILLIP CARROLI., individually, and in his official capacity, AUGUSTINE SALVITTI, individually, and in his official capacity, and THE REDEVELOPMENT AUTHORITY OF PHILADELPHIA

(D.C. Civil No. 75-240)

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: SEITZ, *Chief Judge* and ALDISERT and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel submitted under Third Circuit Rule 12(6) on March 29, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 3, 1976, be, and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court. Costs are taxed against the appellees.

ATTEST:

/s/

Clerk

May 25, 1977

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAROLD ROSENTHAL — Civil Action

v.

FRANK L. RIZZO, et al. — No. 75-240

MEMORANDUM OPINION AND ORDER

WEINER, J. — APRIL 30, 1976

In an Opinion dated February 20, 1976, on defendants' motion for summary judgment in this case, we concluded that the discharge of plaintiff from employment with the Redevelopment Authority of Philadelphia (hereinafter referred to as "RDA") was not violative of plaintiff's Fourteenth Amendment rights. However, we granted plaintiff leave to file an amended complaint substantiating his claim of abridgement of his First Amendment rights of freedom of speech and association. Plaintiff has filed an amended complaint and has also filed a motion for reconsideration of our previous order. Defendants have again moved for summary judgment.

I. THE FIRST AMENDMENT ISSUE

Plaintiff alleges, in this amended complaint that his termination was motivated by his non-alignment with defendant Rizzo's political activities and beliefs. As a result, plaintiff contends that his right under the First Amendment of freedom of association has been violated.

Since there is no substantial dispute as to the facts there remains solely the question of whether plaintiff's employment was a "policy-making" position. Plaintiff had been hired as an administrative assistant to supervise competitive bidding procedures on moving contracts offered by the R.D.A.

In the case of *Illinois State Employees' Union Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972) a "policy-making" employee was defined as:

> ". . . any employee engaged directly or indirectly in the formulation or implementation of the policies of the particular governmental office or agency." *Id.* at 578.

This definition was interpreted in *Nunnery v. Barber*, 503 F.2d 1344 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975), to exclude only ". . . those public employees whose duties were 'routine', involving the exercise of no administrative policy or public duties as broadly defined." *Id.* at 1353. The significance of the definition of a policy-making employee is that for policy-making employees, the protection afforded by the First Amendment do not obtain. *Nunnery v. Barber, supra; Illinois State Employees' Union Council 34 v. Lewis, supra; Indiana State Employees' Association v. Neglev*, 365 F. Supp. 225 (S.D. Ind. 1973); *Gould v. Walker*, 356 F. Supp. 421 (N.D. Ill. 1973). This exception stems from what has been characterized as ". . . the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials." *Illinois State Employees' Union Council 34 v. Lewis, supra*, at 574.

Based upon our review of the affidavits and deposition transcripts we find that plaintiff was employed in a policy-making position by the R.D.A. His duties included the investigation and supervision of the bidding procedures for moving contracts and thereby he made, at the minimum, an indirect contribution to the formulation of R.D.A. policy. As a result of this finding, we have concluded that as a matter of law plaintiff cannot successfully challenge the termination of his employment on the basis of infringement of his First Amendment rights.

II. THE FOURTEENTH AMENDMENT ISSUE

Plaintiff's contention here is based upon his claim that he had a property right in continued employment and therefore could not be discharged without a hearing. In terms of public employment, a property interest arises from a reasonable expectancy of job retention amounting to a quasi-contract and not from a unilateral subjective expectation of continued employment. See, for example, *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). Plaintiff contends that his status as a "permanent" employee of the R.D.A. and the R.D.A. personnel policy that as such he could only be discharged for cause create such a quasi-contract. Defendants, on the other hand, claim that under Pennsylvania law plaintiff had no property interest in his employment and therefore no pretermination hearing was required.

We are not persuaded that the existence of a personnel policy which provided for termination only for cause is sufficient to establish the requisite property interest. We find the case of *Mahoney, et al. v. Philadelphia Housing Authority*, 13 Comm. Ct. 243, 320 A.2d 459, *cert. denied*, 417 U.S. 1122 (1974) to be of great assistance in resolving this issue. In that case, plaintiffs, four executive employees of the Philadelphia Housing Authority, were dismissed only for cause with two-weeks prior notice and a statement of the reasons for dismissal. The policy also provided for an appeal procedure for administrative personnel. The court there held that the absence of specific legislative authority precluded public authorities from creating tenure by contract express or implied, and thus plaintiffs had no property right in continued employment. See also *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A.2d 278 (1960); *American Federation of State, County and Municipal Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971).

The holdings in the *Mahoney* and *Scott* cases clearly indicate that under Pennsylvania law no implied contract is created by plaintiff's status as a permanent employee and therefore we conclude that he had no valid property interest in continued employment. As a result plaintiff has no rights under the Fourteenth Amendment to notice or to pretermination hearing.

Since there are no material facts in dispute and since we have found no violation of plaintiff's constitutional rights which would give rise to any judicially-cognizable claim, we are compelled to grant defendants' motion for summary judgment and to deny plaintiff's motion for reconsideration.

ORDER

Plaintiff's motion for reconsideration is DENIED.

Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

/s/

CHARLES R. WEINER, J.

Supreme Court, U. S.
FILED
SEP 19 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-302

FRANK L. RIZZO, *et. al.*,

Petitioners,

vs.

HAROLD ROSENTHAL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF THE CASE

Respondent, Harold Rosenthal, in his district court complaint, alleged that he had been fired from his position as an Administrative Assistant II in the Commercial and Industrial Relocation Department of the Redevelopment Authority of Philadelphia (hereinafter "RDA") in violation of his First

Amendment right to free political association and belief. Further, he alleged that he occupied a "non-policymaking" position with the RDA.

The city petitioners, Frank L. Rizzo and Philip Carroll, Mayor and Deputy Mayor of the City of Philadelphia, respectively, defended the complaint on the basis that respondent occupied a "policymaking" position, as that term is used in *Elrod v. Burns,* 427 U.S. 347 (1976); while the RDA and Augustine Salvitti, the Executive Director of the RDA who was responsible for the firing of the respondent, admitted, in his answer to the complaint, that respondent was in a "non-policymaking" position.

The depositions of respondent, Augustine Salvitti, Lynn Abraham, the Executive Director of the RDA during most of respondent's 15 month tenure, were taken, among others. On defendants' motion for summary judgment, the district court entered judgment for all defendants on the First Amendment issue, holding that "based on our review of the affidavits and deposition transcripts, we find that plaintiff was employed in a policymaking position with the RDA" (Petition at A18), and that therefore respondent could not challenge the termination of his employment on the basis of an infringement of his First Amendment rights.

The Court of Appeals for the Third Circuit reversed the district court, holding that ". . . the district court took it upon itself to weigh the conflicting evidence and resolve the issue against Rosenthal on a motion for summary judgment. This was error" (Petition at A4). The court held that respondent was

". . . improperly deprived of a full trial on the issue of his status as a policymaker" (Petition at A7).

Respondent, from the outset, has maintained that whether or not he was a policymaker is an issue which requires a trial on the merits, and not one which is susceptible to decision on summary judgment. An examination of the "factual" statements contained in petitioners' brief, particularly in its "Statement of the Case", and indeed, even in its "Questions Presented", shows that there remains a genuine issue of material fact when compared to evidence supportive of respondent's position.

Petitioners state, in their "Questions Presented", that respondent was "an indisputably confidential employee", and an "intradepartmental spy". These conclusions of law or conclusions of ultimate fact (which, *ipso facto,* decide the constitutional question) are hotly disputed, as are the evidentiary facts underlying them. See, *e.g.,* Harold Rosenthal Affidavit, Plaintiff's Response to Defendants' Motion for Summary Judgment, wherein Rosenthal states:

> "throughout the course of my employment with the Authority, and during the tenure of Lynn Abraham, I performed neither a 'spying' nor an investigative function for Lynn Abraham, formally or informally, officially or unofficially, overtly and covertly. I never reported to Lynn Abraham directly by myself in any capacity. . .in all respects I was treated like any other employee at the Authority."

Petitioners assert that respondent was hired as a "confidential" employee and that he was the Executive Director's "personal investigator", and further that respondent's "primary purpose was to investigate and report directly to her [Executive Director]" (Petition at 3). Contrariwise, respondent's position is that his job was to perform the functions of the position for which he was hired, *viz.*, an Administrative Assistant II (Deposition of Lynn Abraham at 9-10). Furthermore, he performed his job very well, having received three (3) "superior" job performance evaluations during his 15 month tenure. Significantly, these evaluations were given by persons other than Lynn Abraham, the individual with whom respondent allegedly had a "confidential" relationship.

Petitioners state that the majority opinion in *Rosenthal* agreed that respondent was a "confidential" employee and an "intradepartmental spy" (Petition at 5-6). However, nowhere in the majority's opinion is it stated that respondent was in fact a "confidential" employee or an "intradepartmental spy", although they intimate that he *may* have been. Again, petitioners leaped to unwarranted conclusions of law.

The majority opinion in *Rosenthal* viewed the case as one of whether or not respondent was a policymaker in the same way the *Elrod* plurality had intended the question to be viewed. It recognized the difficult factual problems inherent in such a determination and thus decided that summary judgment was highly improper. This is the correct result. The dissent, on the other hand, like the district court, would have used summary judgment to decide the issue.

Petitioners would have this court believe that all of the underlying facts are not in dispute, but that only an ultimate conclusion of fact or law need be drawn. The dissent states that "All parties agree that Rosenthal was hired as Lynn Abraham's personal investigator" (Petition at A9). Respondent vouchsafely disputes this finding. Similarly, the dissent maintained that Rosenthal's ". . . mission was to investigate a certain department and report directly back to Abraham on its activities" (Petition at A14-15). Again, this is disputed and the record contains substantial evidence contrary to this finding. Furthermore, the dissent completely ignored the record evidence establishing that respondent was a highly competent employee. The dissent erroneously based its legal conclusions on facts which, at best, were incomplete, and, at worst, were non-existent or unsupportable by the record.

It is clear that there are many basic factual issues needing resolution before this Court can properly and judiciously make a determination of the parameters of the legal principles involved. The order of the court of appeals is correct in that, *inter alia,* it has brought this litigation that much closer to a full evidentiary hearing on the merits of whether or not respondent occupied a policymaking position.

REASONS FOR DENYING THE WRIT

I.

Petitioners failed to exhaust all available appellate rights.

Rule 40 of the Federal Rules of Appellate Procedure provides that any party aggrieved by a decision of the court of appeals may file a petition suggesting that the decision be reheard and reviewed by the court *en banc*. This was an appellate right which petitioners failed to exhaust without any apparent reason. Exhaustion of appellate rights is always significant; it is most significant in this case in that the legal question raised by petitioners is, at first blush, a novel one, and thus one which should first require the attention and adjudication of an *en banc* court. Petitioners' failure to request an *en banc* hearing should militate against this Court's exercise of its extraordinary and discretionary jurisdiction.

II.

The legal issue presented is not ripe for decision by this Court: the facts of the case are in sufficient dispute that the Court lacks a proper factual record; and that this Court should await more lower court decisions.

Were this Court to hear the legal question involved it would be doing so on the basis of a sparse factual record. It must be remembered that respondent's complaint was dismissed by way of summary judgment without the benefit of an evidentiary hearing. Petitioners' brief states that "respondent was, according

to the testimony of all witnesses, a 'confidential' employee" (Petition at 8). Harold Rosenthal, in his affidavit, disputes this; Lynn Abraham, in her deposition, states that in all respects Rosenthal was treated like any other employee of the RDA. Indeed, the deposition of Augustine Salvitti, the Executive Director who fired respondent, states that Salvitti thought Rosenthal was a "spy", but when asked for specific facts supporting this belief, he was unable to give any. Nor for that matter was he able to give any specific facts as to why he had the opinion that respondent was not qualified for the job he had been performing (Deposition of Augustine Salvitti at 5-6).

Petitioners, of course, places great weight in the *Rosenthal* dissent which, *inter alia,* states that ". . . Rosenthal was not an integral part of the Commercial Industrial Relocation Division (sic): rather he was a personal extension into that department of its administrator Lynn Abraham. . . his [Rosenthal's] original function now defunct, he could not implement the policies of the new administration. . ." (*Rosenthal* at A16). With all due deference to the opinion, these are characterizations and conclusions not supported by the factual record, incomplete as it is. The dissent ignores the fact that substantial record evidence exists which shows that Harold Rosenthal was a highly capable employee in his function as an Administrative Assistant II and that he had received three "Superior" job evaluations from his supervisors, which evaluations were rendered on a regular basis, as they were with any other employee of the RDA.

The Court should have the benefit of a full factual record on all of the issues involved which may bear on such terms as "policymaking" and "confidential" before delineating the legal

principles governing the extent to which a governmental employee is, or is not, protected by the First Amendment.

In this regard, the Court does not have the advantage and benefit of any opinion of either courts of appeals or district courts. By waiting for future cases, this Court would have a variety of views, rather than only a majority and dissenting opinion from one appellate court. As Mr. Justice Frankfurter said in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917 (1950), (opinion dissenting from denial of certiorari):

> "It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening."

The fact that this issue is not ripe for decision is further illustrated by the petitioners' appellate briefs which show, in the "Statement of Issues Presented", that whether or not Rosenthal was a "confidential" employee, as Mr. Justice Stewart used the term in *Elrod*, was not squarely addressed to either the court of appeals or the district court (Respondent's Brief at A1).

III.

The opinion below is fair, accurate, and consonant with existing authority.

The majority opinion in *Rosenthal*, joined in by Chief Judge Seitz, was based specifically on the plurality opinion in *Elrod*. The court of appeals applied the law of this Court as enunciated in *Elrod* as it existed, and as such, the decision is in

line with applicable authority. In addition, the opinion was fair in that Harold Rosenthal, having been deprived of his day in court, now has an opportunity to present to a jury all of the facts relevant to his case.

IV.

The basic underlying facts are so in dispute that it would be improvident for this Court to base an opinion on them.

Petitioners would lead this Court to believe that the undisputed evidence is that Rosenthal was a "spy," "personal investigator," a "confidential employee," and an "advisor," but, on the other hand, there is ample evidence in the record demonstrating that Harold Rosenthal was merely a "soldier" functioning as a "relocation technician," and, in the testimony of Lynn Abraham:

> "He was there to check and see that that was done and when somebody put in a voucher to see that X number of crates were moved, they checked it . . ." (Deposition at 12-13).

She further testified that:

> ". . . one does not have to be a college graduate to read a manual and add two and two and make sure it does not come out to seven." (Deposition at 13).

In terms of an alleged spying function performed by Rosenthal, Ms. Abraham said that Rosenthal did not have such a function and that he simply worked for her as Executive Director (Deposition at 10).

As the majority opinion in *Rosenthal* notes ". . . evidence as to the nature of Rosenthal's duties, in the form of depositions, is imprecise and cuts both ways" (Petition at A4), thus supporting its holding that the conflicting evidence should not have been decided on a motion for summary judgment, but rather required a trial on the merits. For this Court to hear the legal issue involved, at this juncture, would be an injudicious leap to constitutional adjudication.

CONCLUSION

For the foregoing reasons, respondent prays the Court to deny the requested writ.

Respectfully submitted,

s/ Michael Cox
Attorney for Respondent

APPENDIX

PETITIONERS' RIZZO AND CARROLL "COUNTER STATEMENT OF ISSUES PRESENTED" IN BRIEF TO COURT OF APPEALS

I. Did appellant Rosenthal have a property interest in his employment protected by the Due Process Clause of the Fourteenth Amendment?

II. Did not Salvitti have an unfettered right to discharge Rosenthal under the law?

PETITIONERS' SALVITTI AND RDA "STATEMENT OF ISSUES PRESENTED FOR REVIEW" IN BRIEF TO COURT OF APPEALS

I. Did the trial court err in finding that Pennsylvania law does not recognize a property interest in employment?

II. Did the trial court err in finding the plaintiff-appellant was a policymaking employee and therefore dischargeable at will?